

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 August 2024

DOCKET NUMBER: AR20240000621

APPLICANT REQUESTS:

- an upgrade of his bad conduct discharge
- a personal appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DD Form 214 (Report of Separation from Active Duty) (duplicate)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He was a stellar Soldier in the Army during his time in. He was driving back from Denver to base at Fort Carson, CO. His car was surrounded by Criminal Investigation Division (CID) agents. He had no clue why he was being pulled over. His fellow Soldier asked him to pick up a package for him in Denver while he was there. It turned out to be drugs. He was arrested, faced charges, convicted, and sentenced to the brig in Fort Leavenworth, KS. During his court trial he found out his friend was facing other charges and he was used for entrapment. As he has gotten older, he reflects on his military service. During his court trial he found out his friend was discharged.

b. For the last 30 years, he was a journeyman electrician. He is a very religious man, and his spouse is a pastor. Since he retired, he is very active at his church in Greer, SC. His service record before the incident was spotless. He is a cancer survivor and beat numerous health issues including three strokes.

3. The applicant enlisted in the Regular Army on 29 June 1976.

4. The applicant accepted nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) on 11 March 1977 for failing to obey a lawful order on or about 18 February 1977 and without authority, going from his appointed place of duty on or about 18 February 1977. His punishment consisted of extra duty, forfeiture of \$97.00 pay for one month (suspended). On 25 April 1977, the punishment was vacated.
5. The applicant accepted NJP under Article 15 of the UCMJ on 15 December 1977 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 8 December 1977. His punishment consisted of extra duty, and restriction.
6. Before a special court-martial on 9 June 1977, the applicant was found guilty of:
 - without authority, failing to go at the time prescribed to his appointed place of duty on or about 8 March 1977, 10 March 1977, 21 March 1977 and 18 April 1977
 - wrongfully have in his possession 97.43 grams, more or less, of marijuana on or about 31 March 1977
 - wrongfully selling marijuana on or about 31 March 1977
 - wrongfully have in his possession 360 grams, more or less, of marijuana on or about 15 April 1977
 - wrongfully transferring marijuana on or about 15 April 1977
7. The court sentenced him to be reduced to private/E-1, to forfeit \$249.00 pay per month for a period of three months; to be confined at hard labor for 75 days; and to be discharged from the service with a bad conduct discharge (BCD). The sentence was approved on 19 August 1977. The record of trial was forwarded for review by the Court of Military Review.
8. The Court of Military Appeals approved the findings of guilty and the sentence, the sentence was affirmed on 17 October 1977. The applicant received the decision on 25 October 1977.
9. The U.S. Court of Military Appeals letter, dated 30 January 1978 shows the applicant was advised his petition for review was granted.
10. The applicant accepted NJP under Article 15 of the UCMJ on 15 February 1978 for without authority, failing to go at the time prescribed to his appointed place of duty on or about 7 February 1978. His punishment consisted of forfeit \$50.00 for one-month, extra duty, and restriction.
11. The applicant remained on active duty pending appellate review.

12. Special Court-Martial Order (SCMO) Number 61, dated 28 August 1979, issued by Headquarters, U.S. Armor Center and Fort Knox, Fort Knox, KY, shows the sentence having been complied with was ordered to be duly executed.

13. The applicant was discharged on 11 September 1979. His DD Form 214 shows he was discharged under the provisions of Army Regulation (AR) 635-200 (Personnel Separations-Enlisted Personnel), Chapter 11, as a result of court-martial with Separation Code JJD and Reenlistment Code 3 and 3B. His service was characterized as under other than honorable conditions and he was issued a Bad Conduct Discharge Certificate. He completed 3 years and 3 days of active service. He had 64 days of lost time from 9 June 1977 to 11 August 1977.

14. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

15. In reaching its determination, the Board can consider the applicant's petition and service record in accordance with the published equity, injustice, or clemency determination guidance.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for liberal consideration of discharge upgrade requests. The Board considered the applicant's statement and record of service, the frequency and nature of the applicant's misconduct and the reason for separation. The applicant was separated for conviction by court-martial for failing to go to his appointed place of duty on four occasions, possessing 97.43 grams of marijuana, selling marijuana, possessing 360 grams of marijuana, and transferring marijuana. The Board found no error or injustice in the separation proceedings. Based on a preponderance of the evidence, the Board concluded that the characterization of service the applicant received upon separation was appropriate.

2. The applicant was given a bad conduct discharge pursuant to an approved sentence of a general court-martial. The appellate review was completed and the affirmed sentence was ordered duly executed. All requirements of law and regulation were met with respect to the conduct of the court-martial and the appellate review process and the rights of the applicant were fully protected.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR begins its consideration of each case with the presumption of administrative regularity, which is that what the Army did was correct.

a. The ABCMR is not an investigative body and decides cases based on the evidence that is presented in the military records provided and the independent evidence submitted with the application. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

b. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

3. AR 635-200 sets forth the basic authority for the separation of enlisted personnel. The version in effect at the time provided that:

a. An honorable discharge is a separation with honor and entitles the recipient to benefits provided by law. The honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for Army personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.

b. A general discharge is a separation from the Army under honorable conditions. When authorized, it is issued to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

c. Chapter 11 provides for the separation of personnel because of unsatisfactory performance or conduct (or both) while in an entry-level status. When separation of a Soldier in an entry-level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both) as evidenced by inability, lack of reasonable effort, or failure to adapt to the military environment, he or she will normally be separated per this chapter.

4. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

5. The Under Secretary of Defense (Personnel and Readiness) issued guidance to Service Discharge Review Boards and Service Boards for Correction of Military/Naval Records (BCM/NR) on 25 July 2018, regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//